

**FEB 5 1945**

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**No. 520**

**In the Supreme Court of the United States**

*October Term, 1944.*

**FRED G. DRUMMOND, Petitioner,**

**vs.**

**UNITED STATES OF AMERICA.**

*On Writ of Certiorari to the United States Circuit Court of  
Appeals for the Tenth Circuit.*

**REPLY BRIEF of PETITIONER**

✓ **ROY ST. LEWIS,**  
National Press Building,  
Washington 4, D. C.,

✓ **CHAS. R. GRAY,**  
**W. N. PALMER,** \*  
Pawhuska, Okla.,  
*Attorneys for Petitioner.*

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(Italics in this brief are ours for emphasis.)



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**REPLY BRIEF *of the* PETITIONER.**

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**This Brief.**

The petitioner ascertained from the Clerk of this Court that his brief presented in support of his petition for writ of *certiorari* could be used as his principal brief in this case.

He therefore requests that it be so used. This brief is in reply to the brief on behalf of the United States and is supplemental to petitioner's original brief.

**Summary of Argument.**

1. The United States assisted George Pitts in carrying on the state court litigation and thereby consented to be bound by the state court judgment. (See original brief, pages 40 to 45).

2. Section 7 of the Act of April 18, 1912, does not reimpose restrictions upon the inherited property of an Osage

Indian with a certificate of competency, but merely protects the administrator of the estate of the decedent in the possession of the property of which the administrator is entitled to possession. To hold otherwise would impose restrictions upon Indians with certificates of competency and upon white heirs and would conflict with Section 6 of the same Act and with the first sentence in Section 7.

3. The respondent's construction is in conflict with judicial interpretation and also with departmental interpretation. (See original brief, pages 15 to 21; original brief, pages 21 to 23.)

4. The land inherited by George Pitts was turned over to him by operation of law upon the death of his wife Mamie. (See original brief, pages 23 to 29.)

5. The Circuit Court of Appeals did not construe Section 3 of the Act of February 27, 1925.

6. Section 3 of the Act of February 27, 1925, was enacted to impose restrictions upon lands taken by will by beneficiaries of one-half or more Indian blood who had not been granted certificates of competency, and the section does not reimpose restrictions against alienation upon heirs who have certificates of competency.

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## ARGUMENT.

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### **The United States Has Consented to Be Bound by the State Court Action.**

The respondent has cited authorities in support of the contention that a judgment in proceedings to which the United States is not a party did not preclude the United States from suing to enforce restrictions on Indian lands.

Those cases are not controlling in this situation. The exception to the rule therein announced is that where the United States assists in the state court litigation, as it did in this instance, it does thereby consent to be bound by the resulting judgment.

It is not a question as to whether or not the United States was a party to the state court litigation, and it is not a question as to whether or not counsel appearing in the state court litigation was authorized to represent the United States. The question is: Did the United States by its activities consent to be bound by the state court judgment?

This Court and the Circuit Court of Appeals held in the case of *United States v. Candelaria*, 270 U. S. 432, 70 ed. 1022<sup>1023</sup>, and 16 F. (2d) 559, that the United States had consented to be bound in that case. In that case Wilson represented the Pueblo in exactly similar circumstances as Barney represented George Pitts in the state court litigation in this instance.

The only distinction that can be made as to the facts is that in the *Candelaria* case the Pueblo apparently was without funds and the United States paid Wilson's attorney fee. In the present case George Pitts had funds and the United States paid Barney from George Pitts' funds. It is

not a distinguishable difference, and the payment was only an incident in the representation as conducted by Wilson and as conducted by Barney.

### **The Effect of a Certificate of Competency.**

. In the discussion of both the Act of April 18, 1912, and the Act of February 27, 1925, the respondent endeavors to limit the effect of a certificate of competency.

As an example it is stated, page 11, that Section 7 of the 1912 Act is merely another instance in which Congress sought to protect the Indian even though he had a certificate of competency.

It never was the policy of Congress to protect the Indian with a certificate of competency after its issuance.

The Act of June 28, 1906, authorized the issuance of a certificate of competency and provided that the homestead allotment could not be alienated and that the community interest in the tribal property could not be alienated. Otherwise there was no policy of Congress to protect the Indian with the certificate of competency. He was considered by Congress to have the status of a white man and in all of the later legislation Congress distinguished between the Indian with a certificate of competency and the Indian without.

Section 7 of the Osage Act of June 28, 1906, (34 Stat. L. 539) provides that the Secretary of the Interior may issue to any adult member of the Osage Tribe a certificate of competency "if upon investigation, consideration and examination \* \* \* he shall find any such member *fully competent and capable of transacting his or her own business and caring for his or her own individual affairs.*" Said section further provided that upon the issuance of such certificate of compe-

ency the member to whom it was issued "shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States \* \* \*." (The homestead allotment was excepted.)

The certificate of competency issued to George Pitts on June 11, 1910, (Rec. 22, 23) stated: "Whereas upon investigation, consideration, and examination of the request, George Pitts has been found to be fully competent and capable of transacting his own business and caring for his own individual affairs," the certificate declared that the Secretary of the Interior does issue to George Pitts a certificate of competency "and does hereby invest him with full power and authority to sell and convey any of the surplus lands deeded to him under the provisions of said Act of Congress except the minerals therein which are reserved for the use of the Osage Tribe for a period of twenty-five years from April 8, 1906, *and does hereby declare him to be fully competent and capable of managing and caring for his individual affairs.*"

#### **Section 7 of the Act of April 18, 1912.**

##### ***The Reasoning Concerning Section 7 of the 1912 Act:***

The respondent reasons that the first clause of the first sentence of Section 7 applies to the allotted lands, inherited or otherwise, and that the second clause applies to any lands, whether inherited or not; lands acquired in the course of trade or business. Then it is reasoned that full protection has been afforded by the first sentence to the Indians without certificates of competency and that, therefore, the second sentence must apply to Indians with certificates of competency or it would have no field for operation. If this is correct reasoning, it is certain that respondent has given

an erroneous interpretation to the second sentence of Section 7 for beyond doubt Congress was not thereby intending to impose permanent restrictions on the certificate member and the non-member of the tribe, but the reasoning is faulty. Section 6 fixes the status of the inherited lands in the hands of a certificate of competency member and of the non-member of the tribe. If the first sentence applies to inherited land, it definitely fixes the date of its alienability as of the date of the issuance of the certificate of competency.

Incidentally it seems doubtful if Congress intended by the second clause in the first sentence to impose restrictions against alienation of lands or funds which the Indian might acquire by his own labor or effort. It is more probable that Congress was legislating as to tribal property only.

Respondent attempts to reason to the conclusion that by the second sentence in Section 7 Congress was reimposing restrictions removed by Section 6 from the certificate of competency member and from the non-member of the tribe, whereas the purpose was to protect the estate of the decedent so far as necessary for the purpose of administration of the decedent's estate.

If the construction contended for by the respondent is a possible one, it still is not such construction as would conform to the intention of Congress, because :

1. It conflicts with Section 6.
2. It conflicts with the first sentence of Section 7.
3. It forever imposes one class of restrictions on property inherited by the certificate of competency Indian.
4. It forever imposes one class of restrictions on property inherited by the white heir.
5. It conflicts with the well established purpose of Congress to liberate the certificate of competency Indian.

On the other hand, if Congress intended to say that inherited lands and moneys could not be subject to or taken or sold to secure the payment of any indebtedness to the heir prior to the time such lands and funds are turned over to such heirs, there is no conflict, no uncertainty, and the enactment follows the general policy of the law to protect the estate of the decedent where the administrator was authorized to use it to satisfy the purpose of the administration of that estate, which was obviously the intention of Congress.

Or, if Congress by the second sentence in Section 7 intended to impose restrictions on the inherited property of the heirs, it could not have been the heirs liberated from the restrictions by Section 6.

The respondent's brief reiterates the statement made by the Circuit Court of Appeals, after reciting the holding of the Supreme Court of Oklahoma to the effect that the restricted land of Mamie Pitts descended to her husband free from the possession and control of the administrator for the reason that the land, being restricted in Mamie Pitts' hands, was not subject to her debts: "This reasoning leads to the incongruous result that Congress intended to throw a greater protection around the unrestricted lands inherited by an Osage Indian than around the restricted land inherited by the same Indian."

The difference is that the administrator is entitled to possession of the unrestricted lands of the decedent to use to pay debts of the decedent and Congress wanted that purpose fulfilled. The administrator is not entitled to possession of the restricted land of the decedent at all and when the restricted land descends to and the title vests in the heir immediately, and the heir is entitled to it immediately without the intervention of an administrator.

If the second sentence in Section 7 is subject to an interpretation which would reimpose restrictions removed by Section 6 from the certificate of competency member and non-member, as contended for by the United States, it is also subject to an interpretation which would prohibit the interference with the administrator of his possession and use of the property of the estate, of which he was entitled to possession, until he turned it over to the heir.

The suggested incongruity lends support to the position that Congress was endeavoring only to protect the administrator in his possession of any property of which he was entitled to possession for then there could be no incongruity.

The real incongruity comes in the attempt to place an interpretation on the second sentence in Section 7 which conflicts with Section 6 and with the first sentence in Section 7:

On pages 15 and 16 of the brief of the respondent an attempt is made to support the reasoning of the respondent by citing Congressional Acts concerning governmental regulations of Indians as a whole before the time of allotment and when the whole tribal membership was being provided for through licensed Indian traders. Certainly such situations furnish no criterion for the determination of the policy of Congress toward those Indians who years later were adjudged to be competent.

***The Land Was Turned Over to George Pitts Upon the Death of His Wife, Mamie:***

This point was fully presented in petitioner's original brief and the presentation here will be short.

The authorities which establish that this land was not an asset of the estate of Mamie Pitts, which was subject to

administration, are not controverted. It appears rather to be contended that the final vesting of title does not take place until the heirs have been determined.

That position is so contrary to the universal rule that the title vests immediately in the heirs upon the death of the intestate that the contention must be disregarded. It is noted that the respondent does not undertake to say who had the title, the right to possession, or ownership after the death of Mamie Pitts and until the heirs were determined.

George Pitts not only had the title but he had possession, the right to possession, and ownership from the moment of the death of his wife. There was nothing withheld from him.

Later the court determined that he had them, but no fact was held in abeyance until the court so determined. The court merely determined that those facts existed from the date of the death of Mamie Pitts, and that determination did not give George Pitts any more or additional rights. It simply enabled him to more easily establish them should anyone challenge them.

Oklahoma cases are cited to support the contention that the turning over was held in abeyance until the determination of the heirs. The cases do not support the contention but there can be no better Oklahoma authority on the question than *Pitts v. Drummond*, 198 Okl. 574, 118 P. (2d) 244, where the exact point was decided on the exact facts which are now before this Court. If then it is a question of interpretation of the Oklahoma law, the decision in *Pitts v. Drummond* is conclusive.

The fact that there might be several heirs and that the heirs might disagree cannot change the law which gives the heirs the title, ownership and the right to immediate possession of such land upon the death of the intestate.

**Section 3 of Act of February 27, 1925.  
(43 Stat. L. 1008.)**

***The Circuit Court of Appeals Did Not Interpret:***

The Circuit Court of Appeals did not pass upon the contention of respondent with reference to the interpretation of Section 3 of the Act of February 27, 1925, and, therefore, this Court reserves the right to refuse to pass upon said contention, according to the rule announced in the case of *Cities Service Oil Company v. Dunlap*, 308 U. S. 208, 84 L. ed. 196, and *Ensteen v. Simon Ascher & Co.*, 282 U. S. 455, 75 L. ed. 453.

**(a) *The Meaning of a Certificate of Competency:***

In considering Section 3 of the Act of February 27, 1925, it should be borne in mind that Congress has in all legislation recognized the distinction between those Osage Indians with certificates of competency and those without.

The statutes already referred to herein show that distinction. Here are some of the others:

Section 1 of the Act of February 27, 1925, provides that each quarter there shall be paid to each adult Osage Indian of one-half or more Indian blood "having certificate of competency" his entire share of the accumulated income of the tribe, and to each adult member of the tribe, "not having a certificate of competency" certain limited amounts.

We direct attention to the language of another section of the same act:

"*Sec. 6.* No contract for debt hereafter made with a member of the Osage Tribe of Indians not having a certificate of competency, shall have any validity, unless approved by the Secretary of the Interior. In addition to the payment of funds heretofore authorized, the Secretary of the Interior is hereby authorized in his dis-

cretion to pay, out of the funds of a member of the Osage Tribe not having a certificate of competency, any indebtedness heretofore or hereafter incurred by such member by reason of his unlawful acts of carelessness or negligence."

Note that Indians who have certificates of competency may contract. (This section was construed as applicable to Osages of less than one-half Indian blood and was later amended so as to make it inapplicable to Osages of less than one-half Indian blood.)

In other acts the intention is shown by Congress to free the certificate of competency Indians from supervision.


**(b) *The Meaning of Section 3, and the Mischief to Be Remedied:***

The language of Section 3 definitely discloses no intention to reimpose restrictions on inherited land of an Osage Indian with a certificate of competency.

We quote the entire section:

*"Sec. 3. Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim or judgment except taxes, or subject to alienation, without the approval of the Secretary of the Interior."*

If there is any ambiguity or confusion in the first sentence of this section, it is certainly made clear and definite by the second that there was no intention by Congress to



reimpose restrictions against alienation on lands inherited by an Indian who had a certificate of competency.

It will be remembered that by Section 6 of the 1912 Act those restrictions had been removed.

It was the decision of the Supreme Court of the United States in the case of *LaMotte v. United States*, 254 U. S. 570, 65 L. ed. 410, 41 S. Ct. 204, which caused the enactment by Congress of this Section 3 of the Act of February 27, 1925. In that case it was held that the restrictions against alienation on the lands of a full-blood restricted Osage Indian were removed by the execution of such Indian of a will approved by the Secretary of the Interior; that the devisees under such will took the land free of restrictions even if the devisees were restricted full-blood Indians without certificates of competency.

The United States Supreme Court reasoned that the taking under such a will was taking by purchase; that the will was an alienation, and having been approved by the Secretary of the Interior, was an alienation with the approval of the Secretary of the Interior, and consequently that the restrictions were removed from the lands in the hands of the beneficiary under the will no matter what his status.

The Interior Department sought to change that situation as to the restricted Indians and secured the enactment of Section 3 of the act.

Congress used the word "purchased" because the United States Supreme Court held that the taking under a will was taking by purchase.

That Congress did not intend to deny the right to alienate to any Indian who had a certificate of competency, no matter what his quantum of Indian blood, is made very

clear and definite by the second sentence, which says the property of Osage Indians (any Osage Indians) not having certificates of competency purchased as hereinbefore set forth (that is, taken under will or by inheritance) shall not be subject to a lien, etc., or be subject to alienation without the approval of the Secretary of the Interior.

It is by this sentence recognized by Congress that such lands in the hands of an heir or devisee, who has a certificate of competency, are subject to alienation, and the intention to leave the certificate of competency Indian free to alienate is clearly expressed.

We must look to the mischief which Congress was seeking to remedy. It was that brought about by the *LaMotte* decision which freed the willed land so that it could be alienated in the hands of a non-certificate of competency full blood Indian.

There had been no new mischief as to certificate of competency Indian. His inherited land had been freed from restrictions by the Act of Congress itself since the passage of Section 6 of the Act of April 18, 1912. The purpose not to change the law as to such Indian is clearly expressed.

It will doubtless be contended that by the use of the word "purchased" in the second sentence of Section 3 Congress intended to refer to investments for restricted Indians authorized by Section 1 of the Act, but there is no doubt but that the decision in the *LaMotte* case caused the enactment of Section 3, and in the *LaMotte* case the decision hinged on the question as to whether or not real estate taken under a will was acquired by "purchase," and the Supreme Court of the United States held it was so acquired. We think that was the reason for the use of the word "purchased" in the second sentence of Section 3. It may be no-

ticed that the investment of funds of restricted Indians authorized by Section 1 of the Act was to be in United States bonds, Oklahoma State bonds, real estate, first mortgage loans, stocks in Building & Loan Associations, livestock, deposits in the banks or in the expenditure for the benefit of the Indian. If Congress had been intending to refer to those investments in the second sentence of Section 3, it would certainly not have referred to them as "property purchased" for that general description does not fit the investments authorized.

However, it has been noticed that the second sentence in Section 3 has been given a broader meaning even by the Committee of Congress than we have attributed to it. Assuming such broader meaning is proper it is still evident that Congress by the use of the words "property purchased as hereinbefore set forth" in the second sentence was endeavoring to make clear that there should be no restrictions against inherited or devised property in the hands of an heir with a certificate of competency, for under the terms of Section 1 of the Act no investments were to be made for the Indian with a certificate of competency. He was to be paid ALL of his income and had no funds from which any kind of an investment could be made for him, and hence, there could have been no occasion for excluding the certificate of competency Indian from the operations of the second sentence of Section 3. He was already excluded by reason of the fact that the Secretary had no funds of his to invest and was not authorized to invest any of his funds.

At least this is certain—it was the obvious purpose of Congress to exclude the property of the certificate of competency Indian, whether inherited or not, from the control of the Secretary of the Interior.

It is also clear from the first sentence alone of Section 3 that it was not intended to further restrict certificate of competency Indians.

The language of the first sentence of Section 3 which gives rise to the discussion is: "Lands devised to members of one-half or more Indian blood or who do not have certificates of competency."

Now what Indians are being talked about; what Indians are to be affected? There is only one sentence. The clause beginning with the word "who" is a relative clause, beginning with a relative pronoun. By the rules of grammatical construction it is a qualifying clause, qualifying the persons or class already mentioned in the sentence.

The subject of the sentence is lands and we are trying to find out what lands are meant; the lands of whom. They are lands devised. Devised to whom? Members of the Osage Tribe of one-half or more Indian blood. Now any other qualifying description of those to whom the lands are devised cannot act otherwise than upon the class already described, namely, "members of the Osage Tribe of one-half or more Indian blood." Necessarily the "who" clause has to refer to the Indians already mentioned and no other Indians have been mentioned, except those of one-half or more Indian blood. So the language can mean nothing else except those Indians of one-half or more Indian blood, who do not have certificates of competency, and that must be true notwithstanding the fact that the confusing "or" appears before the word "who." It has to be true because there are no other Indians described to whom the "who" clause could refer.

The words "of one-half or more Indian blood" cannot be eliminated as descriptive of the Indians meant any more

than the word "Osage" could be eliminated as descriptive of the Indians meant.

Then the inevitable conclusion is that the Osage Indians of one-half or more Indian blood, who do not have certificates of competency, cannot alienate.

It then follows that the converse is equally true that those Indians of one-half or more Indian blood, who do have certificates of competency, may alienate.

We also call attention to the fact that there is no attempt by the language used in this Section 3 or of the entire Act of February 27, 1925, to repeal or amend Section 6 of the Act of April 18, 1912, which so specifically and definitely removed the restrictions against alienation of the heir who had received a certificate of competency.

**(c) *The Holding of Judge Kennamer in United States v. Johnson, 29 Fed. Supp. 300, Does Not Support the Appellant's Contention:***

The only question which Judge KENNAMER had for decision, which is of interest here, is whether or not Section 3 of the Act of 1925 applied to John Holloway, a less than one-half blood Indian without a certificate of competency, the contention being made in behalf of Johnson was that as John Holloway was less than one-half blood Indian the section did not apply.

Judge KENNAMER decided that it did apply to all Osages whether one-half blood or more or less than one-half blood. Then by inference he decided that the only thing which would have prevented the application of the section would have been the granting to the heir of a certificate of competency.

In the case at bar George Pitts was granted a certifi-

cate of competency which placed him in a status not covered by the opinion in the *Johnson* case.

It is contended that the reasoning in the *Johnson* opinion is such that it leads to the conclusion that Judge KENNAMER meant to say that, "if the heirs were full-bloods, they could not alienate, even if they had been granted a certificate of competency." Judge KENNAMER says that the section covered two classes:

*First*, members of the tribe of one-half or more Indian blood;

*Second*, members of the tribe who do not have certificates of competency.

Respondent concludes from that statement that Indians of one-half or more Indian blood cannot convey, even if they have certificates of competency.

Note his general statement early in the opinion:

"None of the Indians involved in this cause were or have ever been issued a certificate of competency."

Appearing, as this statement does, at the outset of the opinion, it shows that he was eliminating the certificate of competency question from his consideration.

If he had in mind that the full-bloods could not alienate, even if they had certificates of competency, he need not have mentioned the certificates of competency in connection with any Indian except John Holloway, for all other Indians involved were full-bloods.

It is quite notable, too, that Judge KENNAMER calls attention to Section 6 of the Act of April 18, 1912, and states that when the heirs of deceased allottees have certificates of competency "the restrictions on alienation were removed."

This is the language used:

"The Act of April 18, 1912, 37 Stat. 86, authorized the partition of restricted lands of deceased allottees, subject to the approval of the Secretary of the Interior, and declared that when the heirs of deceased allottees have certificates of competency, or are not members of the tribe, *the restrictions on alienation were removed.*"

Therefore the opinion holds clearly and definitely that when the heir has a certificate of competency the restrictions are removed which we are certain establishes that there was no intention on the part of Judge KENNAMER to hold or to state that the land was restricted in the hands of an heir who had a certificate of competency.

Also please observe that in paragraph numbered 3 of the opinion, attention is called to the fact that the heirs of Sin-tsa-wah-kon-tah, to whom the land first descended, "did not have certificates of competency," clearly implying that, if they had had, the restrictions against alienation would have been removed.

Then again in the same paragraph is this sentence: "The last two are unallotted Indians, born since July 1st, 1907, and neither has a certificate of competency."

Here again is a clear indication that the writer of the opinion has kept definitely in mind the distinction between heirs with certificates of competency and heirs without certificates of competency.

It is again made very evident that Judge KENNAMER was not attempting to decide that the certificate of competency did not give the right to alienate by the fact that the second sentence in Section 3 of the Act of 1925 was not quoted or ever mentioned in his opinion. As the second sentence so clearly states that the intention to impose no restrictions upon any Indian with a certificate of competency,

it is very evident that Judge KENNAMER would not have overlooked this sentence had there been any intention in his mind of holding that the certificate of competency did not give the right to convey. Judge KENNAMER not only throughout his opinion assumes that the Indian with the certificate of competency may alienate, but he states it and calls attention to Section 6 of the 1912 Act and says that restrictions are removed by it when a certificate of competency has been granted.

If there could be any doubt from this *Johnson* opinion as to Judge KENNAMER's holding concerning the certificate of competency Indian, that doubt is entirely removed by his holding in the case of *United States v. Howard*, 8 Fed. Supp. 617.

In that case two full-blood restricted Osage Indians, each without a certificate of competency, had inherited lands from a full-blood restricted Osage Indian without a certificate of competency. The two heirs then partitioned the land and the sheriff's deed in the partition action were approved by the Secretary of the Interior. Judge KENNAMER held that the approval of the sheriff's partition deeds to those two heirs by the Secretary of the Interior had removed their restrictions against alienation but that by Section 3 of the Act of February 27, 1925, here under consideration, the restrictions were reimposed upon those full-blood Indian heirs without certificates of competency, they having inherited the land.

In his opinion, however, he very clearly holds that Section 3 does not reimpose restrictions upon Indians who have certificates of competency.

We quote the third syllabus to the case of *United States v. Howard*, 8 Fed. Supp. 617:

"3. Restrictions against alienation upon lands of members of the Osage Tribe of Indians, which was required by *incompetent heirs*, by inheritance, although restrictions were removed by manner of acquisition through partition proceedings, held reimposed by last statute placing restrictions upon lands devised or inherited by members of tribe *without certificate of competency*, so that conveyance by such heirs, made an enactment of statute, were void. (St. Okl. 1931, § 1614, *et seq.*; Act April 18, 1912, 37 Stat. 86, Sec. 3; Act Feb. 27, 1925, Sec. 3; 25 U. S. C. A., Sec. 38 note)."

Note that in the opinion it is stated that Wah-hrah-lah, the original Osage allottee, was a full-blood restricted Indian who died "*without having a certificate of competency*," and that the lands descended to her *two daughters* Patricia Butler and Grace En-to-kah Abbott, both full-blood Osage allottees "*who have not been granted certificate of competency*."

Then the holding is that the partition action between those two heirs approved by the Secretary of the Interior removed the restrictions against alienation, but that Section 3 of the Act of Congress of February 27, 1925, reimposed the restrictions against alienation and in discussing Section 3 this language is used:

"A reading of the act discloses that its purpose is to protect the *incompetent* Osage allottees \* \* \*."

Quoting further from the opinion:

"It clearly appears that the lands devised to members of the tribe *without certificates of competency* and the lands inherited by such Indians were inalienable."

And quoting further from the opinion, p. 619:

"The purpose of the act plainly appears from

language employed in it; it undertook to reimpose restrictions upon all property whether inherited by or purchased for *incompetent* members of the tribe. In the instant case, the property involved came first by inheritance and then, by reason of the partition proceedings, the estate was changed to that of purchase; in my opinion the purpose and language of the act is sufficiently broad to include the lands in question.

"I am of the opinion that the 1925 Act of Congress reimposed restrictions upon all lands of *incompetent Osage allottees*, such restrictions were reimposed by Section 3 of the Act of Congress of February 27, 1925. All such lands were restricted at the date of the conveyances, restrictions having been reimposed such conveyances are void."

It is felt that, if it had not been for the statement in the *Johnson* opinion that Section 3 covers two classes of Indians, there never would have been a contention by any one that Section 3 reimposed restrictions upon an Indian with a certificate of competency.

It is, therefore, thought to be desirable to indulge in further reasoning concerning the *Johnson* opinion and concerning the possible construction of Section 3. We do, however, wish not to be misunderstood when indulging in that discussion. We take this position definitely: That the *Johnson* opinion cannot be construed as holding that restrictions were imposed upon the inherited land of an Indian who had a certificate of competency because of the deliberate and obvious exclusion of that question from the opinion.

Then it is unimportant from the standpoint of the decision here whether or not the reasoning in the *Johnson* opinion is correct, for whether the opinion is right or wrong it does not support the position of the government for the

certificate of competency question is excluded from the scope of the opinion.

It is our opinion, however, that the reasoning in the *Johnson* opinion cannot be supported and that the conclusion therein reached is wrong.

There is only one class of members of the Osage Tribe mentioned in Section 3, namely, those of one-half or more Indian blood. How are we going to get any other Indians involved in the sentence? No other Indians are mentioned. We cannot just voluntarily put them in. It is only members of the tribe of one-half or more Indian blood who are involved. The sentence does not permit the adding of other Indians by implication. The "who" clause has to qualify some one and we cannot arbitrarily strike out "of one-half or more Indian blood" any more than we can strike out "of the Osage Tribe." They are both prepositional phrases and both modify the noun "members." From a recent reexamination of a grammar we learn that a prepositional phrase either modifies a noun or a verb and that when it modifies a noun it operates exactly as an adjective. In this instance it modifies the noun "members" so that the prepositional phrase "of the Osage Tribe" and the prepositional phrase "of one-half or more Indian blood" are each in effect adjectives modifying "members."

Now the relative "who" clause, as we have already pointed out, can refer to no one else except the members already mentioned qualified by the two prepositional phrases "of the Osage Tribe," and, "of one-half or more Indian blood." Apparently what counsel is asking this court to do is to hold that the relative clause qualifies the word "members" modified by the prepositional phrase "of the Osage Tribe," but then insists that the other prepositional phrase

which modifies the word "members" in exactly the same manner should be entirely ignored or overlooked by the court.

The less than one-half blood Indians are nowhere mentioned in the sentence or in the entire section. To include the less than one-half blood Indians it is essential that the words "of one-half or more Indian blood" be stricken out or ignored, and to say that the legislation refers to all members of the tribe. This cannot be done or said because the words are there. There is no conceivable way of enlarging the number of classes or kind of Indians meant without complete elimination of the prepositional phrase "of one-half or more Indian blood."

Now let us assume that the reasoning in the *Johnson* opinion is correct and that there were two classes of Indians affected; *first*, those of one-half or more Indian blood, and, *second*, those who had not been granted certificates of competency.

It cannot be said that the second class does not include the first class. Why? Because the only way you can include the unmentioned less than one-half blood Indians at all is by including ALL Osage Indians or ALL members of the Osage Tribe and ignore the words "of one-half or more Indian blood." In other words, if the second class includes the less than one-half blood Indians, the reference must be to ALL members of the Osage Tribe which has to include those of one-half or more Indian blood as well as those of less than one-half Indian blood. In still other words, you must say that the "who" clause refers to "members of the Osage Tribe," which includes ALL of them.

All right, by including "one-half blood or more" in the second class mentioned in the opinion, you have concluded

that Congress intended to eliminate the certificate of competency Indian no matter what his quantum of blood from the purview of the act.

The reasoning that Congress so intended is made insurmountable by the consistent policy of Congress to allow the Indian, who has been determined to be competent, to handle his own affairs, and by the provisions of the second sentence in Section 3 which so clearly states that it is only the Indian without the certificate of competency who cannot alienate, and also by the opinion in the *Johnson* case which clearly states that the granting of a certificate of competency removes the restriction against alienation.

It seems to us clear that there is only one class of Indians mentioned in the sentence, that is, those Indians of one-half or more Indian blood, and only those who do not have certificates of competency.

If it had been the intention of Congress to have divided the Indians into classes, it would have been necessary to have used the word "either" in connection with the word "or," that is, either those Indians who are of one-half or more Indian blood or those Indians who do not have certificates of competency. Even then it would not have been such legislation as Congress would have enacted because there would have been overlapping in the groups.

Probably the whole trouble is occasioned by a simple error in transcribing, which was not caught by anyone, but there are other more logical conclusions to be drawn from the actual language than that drawn in the *Johnson* opinion, even if the intention of Congress, and all other Osage legislation, should be ignored.

In the *Johnson* opinion the contention that "or" should be construed as "and" was rejected, but Judge KENNAMER

has himself applied that rule of construction in other cases. In Words & Phrases, when the word "or" is being defined, literally scores of instances are cited where it is proper to construe "or" as "and."

Should it still be felt that it is necessary to explain the word "or" it might be noted that it is used in connection with these other words "or who do not." The words "or do not" mean "unless" or "except." Then we have a sentence looking like this: "Lands devised to members of the Osage Tribe of one-half or more Indian blood, unless they are those who have certificates of competency, shall be inalienable." The sentence might be constructed like this: "Lands devised to members of the Osage Tribe of one-half or more Indian blood, except those who have certificates of competency, etc." The qualifying clause might be in this language: "Except who have certificates of competency."

The word "or" construed with the word "not" makes an exception to the statement which it modifies.

It occurs to us that any of those explanations for the use of the word "or" are more logical than the explanation given in the *Johnson* opinion, and would be in accord with the purpose and intention of Congress.

**(d) *The Congressional Committee Report:***

The Committee on Indian Affairs of the House of Representatives of the United States on March 5, 1924, made a report to the House concerning the bill which was enacted into law, being the Osage Act of February 27, 1925, under discussion here. In that report this is said:

"Section 3. This section provides that lands devised by will, approved by the Secretary of the Interior, and lands belonging to *incompetent* allottees shall not

be alienated without the consent of the Secretary of the Interior, thus preventing the *incompetent* Indians from disposing of the land so received without adequate consideration."

This committee of Congress unquestionably thought that Section 3 means exactly what we contend it means, that it did not prevent a "*competent*" Indian, that is, an Indian with a certificate of competency, from alienating his inherited land.

### **Conclusion.**

May it be suggested that the interpretation sought by the respondent is not supported by authority, precedent, or logic and is contrary to both Congressional and Departmental interpretation, and that for the reasons herein set out the decision of the Circuit Court of Appeals should be reversed.

ROY ST. LEWIS,  
National Press Building,  
Washington 4, D. C.,  
CHAS. R. GRAY,  
W. N. PALMER,  
Pawhuska, Oklahoma,  
*Attorneys for the Petitioner.*